No. 310.

Brief of Gunter for Appellees.

Supreme Court U. S.
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Supreme Court of the United States,

October Term, 1899.

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vs.

EUGENE BEEBE, WILLIAM A. HENSHAW, ET AL.

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Argument of W. A. Gunter, for the Henshaw heirs, Appellees in said cause.

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STATEMENT OF THE CASE AGAINST THE HENSHAWS.

The bill alleges that in 1873 one Widmer gave a bond as collector of revenue, with Ferrie Henshaw and one Beebe as sureties – that Widmer made default to amount of $28,158.56, due with interest from July 1st, 1874, and that afterwards said Widmer died.

That Beebee & Henshaw were partners and owned certain real property, which is described.

That Henshaw died in 1879 intestate, leaving as heirs the parties made defendant as such heirs.

That one W. T. Hatchett, qualified as administrator of Henshaw, and reported the estate insolvent to the proper State Court, showing claims to amount of $54,000.00, including the indebtedness to the United States on said bond. That the estate was duly declared insolvent. (R. 5)

That Hatchett was succeeded in 1882 by one Bellinger, as administrator, and that Bellinger resigned and that there has been no further administration of said estate.

That Beebe & Henshaw from 2 July, 1880, have been insolvent (R. 5) and that by reason of such insolvency, the complainant is entitled to priority.

That on 3d June, 1880. separate suits at law were commenced in the U. S. Circuit Court at Montgomery against said Beebe, and said Hatchett as administrator of Henshaw, for the recovery of the sum due upon said bond for said default; that on February 6th, 1885, judgments were severally entered in said court against each for $100.00 and costs—and that Beebe paid the judgment against him in July, 1886; but that the judgment against Hatchett remains unpaid "and is due and unpaid to the United States." (R. 5)

The said judgments were entered under the following circumstances:

"Said defendants came into court and stated and represented in open court and they caused to be stated and represented for them, that said Beebe and said Ferrie Henshaw were poor men; and that said Beebe and that estate of said Ferrie Henshaw, were without property out of which said judgments could be paid and collected;

that no part of said judgments could be collected by any process of law; that nothing could be made out of them or either of them, or their estates, by execution; but if the court would allow a jury and verdict to be entered against them for $100.00, they and each of them, would pay said judgment and costs;" that no evidence or proof was or had been introduced, and the statements aforesaid only were before the court, and no hearing or determination upon the law or facts was had.

That the court remarked, that unless the district attorney objected, the causes might be disposed of as suggested; that the District Attorney did not object; and said judgments were accordingly entered.

That said statements were untrue and made to deceive said court and United States District Attorney and to defraud the United States. That the District Attorney and the court had no authority to accept said statements and representations, and that the court was without authority to render said judgments under the circumstances, and that they are null and void and should be vacated. (R. 5 & 6).

That in 1877, said Beebe conveyed to Henshaw, his partner, his interest in said property for the alleged purpose of securing certain pretended liabilities of Beebe to Henshaw, and to protect the creditors of the firm; a copy of which is attached as Exhibit B. That this deed was without consideration and fraudulent; that none of the property was sold, and that a final settlement had been made between Beebe and Henshaw, whereby the former was entitled to a re-conveyance, but if not, that said property is liable for the said debt to the United States. R. 7 & 12.

After making parties, the bill prays that said judg-

ments be vacated, that an account be taken of the original debt, and of the claims and liens on said property, and that the amount due the United States be declared a first lien, and the property sold for the payment thereof. Record, 8–9.

The heirs of Henshaw demurred to this bill. Record, 37.

The demurrer was sustained November 6, 1890. Record, 39.

Thereupon, complainant amended the bill.—This amendment is on page 28-9 of the record—the order allowing it on page 40.

The amendment first alleges the execution of another official bond in which Beebe alone, and not Henshaw, was surety, and the recovery of a judgment in 1878 for $579.45 and costs against him in the same court, which was still due and unpaid—an execution thereon having been dnly returned "no property." The amendment then alleges, though the judgment entry and records of said court show that the judgments on the Widmer bond, mentioned in the original bill, were regularly had upon a jury and verdict, that in fact, no jury was then in attendance in said court nor any such verdicts actually rendered; that the jurors had been finally discharged, to-wit, on the 4th February, two days before said judgments were rendered. That orator discovered this fact since the filing of this bill from the examination of the records of said court and of some persons who served as jurors, and of the original papers which do not show the verdict of any jury.

The 11th paragraph of the bill is amended to aver, thot "Henshaw as such assignee, and the heirs of said Henshaw, have paid indebtedness due by said Beebe,

before having satisfied and paid the debt aforesaid due to the United States, to-wit, amongst others, a debt due by said Beebe to Mrs. Sarah S. Watson and J. Curry Watson, amounting to about fifteen thousand dollars." There is no prayer to the amendment. R. 28–29–30.

After the allowance of this amendment, the Henshaws demurred to the bill as amended, assigning the original grounds assigned and other grounds, shown on page 45 of the record.

The cause came on further to be heard, and the demurrers were again sustained and the bill dismissed. Record 46.

The case was then taken to the U. S. Circuit Court of Appeals for the Fifth Circuit, where there was an affirmance.

LAW POINTS.

1. Justice knows no parties, and the same rules are applicaple to all suitors alike. So that when the United States sues or is sued—as also when it contracts or is contracted with—its position of sovereignty gives it no exemption whatever from any of the rules, except the strict statute of limitations, which pertain to common people in such cases. The rule is, that "when the United States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants."

U. S. v. Throckmorton, 98 U. S., 61;
Smoot's case, 15 Wall., 36-45;
Chicago, etc. v. U. S., 104 U. S., p. 685;
Mitchell v. U. S., 9 Pet., 711;
The Siren, 7 Wall., 159; . . .
U. S. v. Beebe, 17 Fed. Rep., 36.

2. While it is true that the United States is not bound by the statute of limitations, as an individual would be, still when a bill is brought after a considerable lapse of time, and after the death of all the parties concerned, seeking to annul judgments surrounded by every presumption which should give them support, it should "present on its face a clear and unquestionable ground on which the jurisdiction it invokes can rest."

U. S. v. Throckmorton, 98 U. S., p. 64;
United States v. Des Moines & Co., 142 U. S., p. 540–1.
U. S. v. Beebe, 17 Fed. Rep., 36.

3. The frauds for which a bill to set aside a judgment or decree between the same parties, rendered by a court of competent jurisdiction, will be sustained, are those which are extrinsic or collateral to the matter tried, whereby the unsuccessful party has been without fault or negligence prevented from exhibiting fully his case.

U. S. v. Throckmorton, 98 U. S., 61;
Pico v. Cohn (91 Cal., 25 A. S. Rep., 159;
McDowell v. Morrell, 5 Lea (Tenn.) 278.

"Public policy requires a rule fixing a line beyond which no further litigation can take place."

ib.
Freeman's notes, 25 A. S. Rep., p. 168.

4. "The particulars of fraud must be alleged; it will not be presumed from loose untraversable allegations of fraud in general."

Marquez v. Frisbee, 101, U. S., p. 478;
U. S. v. Atherton, 102 U. S., 372.

5. A bill which seeks to enforce against different defendants demands which are distinct is multifarious.
Gains v. Chew, 2 How., 619.

6. The judgment record imports absolute verity—and is only to be assailed by direct and precise allegations of fraud. It admits of no contradiction. *Facit ex curvo rectum, ex albo nigrum.*
1 Freeman on Judgments, Sec. 76, 77–8–125.
1 Black on Judgments, Sec. 273., pages 233–4.
Jeter v. Hewitt, 22 How., 352.

"The record is conclusively presumed to speak the truth, and can be tried only by inspection."
1 Black on Judg., 273;
Wilcher v. Robertson, 78, Va., 602;
Mobley v. Nave, 67 Mo., 549.

7. The satisfaction of one judgment of two or more for the same debt is a satisfaction of the entire claim.
2 Freeman on Judg., 467.

ARGUMENT.

The case below went off upon demurrer to the bill, and the question here is, whether the judgment is correct upon any ground. The decision will be affirmed if there is any ground for it to rest upon, irrespective of the reasons assigned for the judgment of the lower court.
McClellan v. Silliman, 6 Wheat., 598;
Davis v. Packard, 6 Pet., 48;
Shrewsbury v. Miller, 10 W. Va., 122.

And as in the Federal courts, special grounds of de-

murrer do not have to be assigned, or, if assigned, are no restriction upon assigning other grounds at the hearing *ore tenus*, the inquiry as to the sufficiency of the bill is not restricted by the special demurrer, though it seems to cover every defect. We will, therefore, only enumerate the objections to the bill as they occur in the argument, first taking up those relating to the form and manner of proceeding, and then those relating more directly to the merits of the case.

THE BILL IS MULTIFARIOUS.

We admit that the question of multifariousness is largely one in the discretion of the court, but there are cases, of which this seems to be one, which are obviously open to the objection.

Gaines v. Chew., 2 Howard, 619.

The bill shows that the United States had a joint claim against Eugene Beebe and Ferrie Henshaw, as sureties upon the bond of one Widmer, as Collector of Internal Revenue, who made default in a large amount, some $28,000, and that it had also a separate and distinct claim against Eugene Beebe, as a surety upon the bond of one Duston as a deputy postmaster, at Demopolis, Ala., who also made default. Rec. 2 and 28.

The United States elected to sue the joint sureties, Beebe and Henshaw, separately, and also sued the individual surety, Beebe, in a separate suit, and in these several suits separate judgments were rendered in favor of plaintiff by proceedings regular upon their face. The judgments against the joint sureties were each for $100 and costs. The judgment against the individual surety was for $579.45 and costs. Rec. 5 and 29.

One of the judgments against one of the joint sureties, namely, Beebe, was paid in full in July, 1886, the judgment being rendered in 1885. Rec. 5.

The judgment against Beebe upon his separate suretyship was rendered December 26, 1878, and execution issued thereon, and was returned no property in 1880. Rec. 29.

The bill is brought to enforce these three distinct claims jointly against the heirs and assigns of Beebe and Henshaw, both of whom are long since deceased. It is to be observed that Henshaw had no connection whatever with the individual claim of the United States against Beebe represented by the judgment for $579.45. There is no special prayer in the bill for relief as to this separate claim against Beebe. Nor is there any allegation in the bill impugning the regularity of this judgment. As to this claim, then, the bill is one to enforce a general judgment at law under a general prayer, if any imaginable relief could be granted thereunder.

As to the other judgments rendered separately against Beebe and Henshaw upon their joint suretyship, one of which has been paid in full, the bill avers that they were rendered under circumstances which entitle complainant to have them vacated as fraudulent and void. Accordingly, the bill avers facts which, in the opinion of the pleader, entitle the complainant to regard the judgments as void and asks for a collection in full of the demand upon which they were rendered, the amount of which is stated. And as to each of these separate judgments on the joint demand, it will be observed that there is no averment anywhere in the bill of any facts which would entitle the complainant to join Beebe and Henshaw, or their heirs and assigns, in one suit to vacate

the several judgments rendered on this joint demand.

It seems obvious that if a creditor, having a joint demand against A and B, elects to sue them separately, when they might have been sued jointly, and recovers several judgments against them, there is no right thereafter to proceed against them jointly to vacate the judgments, on account of acts done by them severally, in the prosecution of the suits against them. If A, in the proceedings against him, commits acts which entitle the creditor to vacate the judgment against him, it must be done in a separate suit, as B is not to be charged with the conduct of A, in which he does not participate. Likewise, if B does acts which entitle the creditor to vacate the judgment against him, A cannot be joined in a suit for that purpose and be made responsible for the acts of B in which he did not participate.

The fact that the separate judgments were rendered upon a joint demand, can make no difference, because there may be different recoveries upon the same demand, whether *ex contractu or ex delicto*, which is sued separately. While the recoveries may be different, the creditor has the election of seeking satisfaction of the largest judgment. The fact, then, of the existence of cause to vacate the separate judgments, and the prosecution of that right, as to one or both of the judgment debtors, would give no right to join them in one suit in the prosecution of such right against them both, unless it is distinctly averred that by some act of conspiracy between the defendants the several judgments were fraudulently secured. If there is no such act of fraudulent conspiracy alleged in the bill, then, the case stands thus: A bill by a creditor having several judgments against two defendants on a joint demand, and a several judgment against one of the defendants upon an individual demand,

to vacate the separate judgments upon the joint demand on the ground of separate frauds by the separate defendants against the complainant on their rendition, and to collect the original joint demand against both of the defendants, and the individual judgment against one of the defendants on an individual demand.

It seems obvious that such a bill is multifarious. Taking it for granted in this immediate discussion that the grounds for vacating the judgments against Beebe and Henshaw are sufficient against them severally, there can be no more reason for joining these defendants in a bill to vacate separate judgments against them for separate frauds committed by them in the individual proceedings against them, than there would be to join them in such a proceeding for a fraud committed by one of them without the concurrence of the other, since it must be obvious that separate acts committed without concert and conspiracy cannot be imputed to strangers, and therefore, as to them, are the same as if not committed. To place complainant's bill, then, in the supposed category, it is only necessary to verify the statement, by an inspection of it, that there is no joint act or conspiracy alleged against the defendants—which we will now shortly proceed to do.

The original bill in the 7th paragraph (R. 5), after stating the rendition of the judgments against the defendants separately, says:

"Said judgments were entered under the following circumstances: That said defendants came into court, and stated and represented in open court, and they caused to be stated and represented for them, that said Beebe and said Ferrie Henshaw were poor men, and that said Beebe and the estate of said Ferrie Henshaw (who is dead, and was represented by his administrator,

one Hatchett) were without property out of which said judgment could be paid and collected; that no part of said judgments could be collected by due process of law; that nothing could be made out of them, or either of them, or their sureties, by execution, but that if the court would allow a jury and verdict to be entered against them, for $100, they and each of them would pay said judgments and costs; that no evidence of proof was or had been introduced in said causes, or either of them, and the indebtedness of said Beebe and Henshaw to the United States then being $28,158.56 and interest, or other large sum; and the statements and representations aforesaid were only before said Circuit Court at the time of the entry of said judgments; and no hearing or determination upon the law and facts involved in said causes was ever had in said court; whereupon the court remarked, that unless the District Attorney of the U. S. objected, the causes might be disposed of as suggested aforesaid; said District Attorney did not object, and said judgments for $100 and costs were entered in each of said causes. And orator avers and charges that said statements and representations made as aforesaid, being on behalf of, and for, said Beebe and said Ferrie Henshaw, and the estate of said Ferrie Henshaw, were wholly untrue, and were made to deceive said court and U. S. Attorney, and for the purpose and with the intent to defraud the United States." The bill then further avers that the court had no authority to accept said statements; that they were not under oath, or in the course of judicial proceedings; and that the acts of the court and U. S. Attorney amounted in law and in fact to a compromise of said demands; and that there was no authority to make the same, and that the judgments are void. On page 29 of the record, the bill, with reference to the said judgments, is amended by averring, that the recital in the judgment entry that a jury of

twelve good and lawful men, to-wit, G. L. Werth and eleven others, duly found said several verdicts for the plaintiff, was false, that in fact no such verdicts were found; that no question was submitted to any jurors in said causes; that in fact the jurors were discharged two days before the entry of the judgments.

These constitute the entire averments of the bill in reference to the conduct of the defendants in said suits respecting the rendition of said judgments, and taking it for granted that the complainant is entitled to relief against each judgment, it is quite obvious that there is no allegation making Beebe responsible for the act of Hatchett, as administrator of Henshaw, or making Hatchett, as administrator of Henshaw, responsible for the act of Beebe. Indeed it is legally impossible for an administrator to act thus for his trust. The defendants had each been sued separately, by the election of the complainant, these suits were necessarily prosecuted separately, the acts and conduct of each defendant were necessarily addressed to the court and district attorney in the suit against themselves separately, and there is no averment of any joint act by them, and the act of Hatchett if any in favor of Beebe must have been personal and not as administrator. And even if the defendants had joined in making the statements mentioned with reference to each separate suit—which is not averred, and which cannot be assumed to be a fact—it would still only give the complainant a right to have the judgment in the particular suit set aside by a separate proceeding against the defendant in that suit, his heirs and assigns. An election once deliberately made can not be retracted; and so the complainant after having elected to sue severally the joint sureties, and having recovered judgments, cannot sue jointly to vacate the several judgments. Without further discussion of

this point, it seems obvious that if there ever was a case of multifariousness, this case falls distinctly in that class.

Story's Eq. Plead., Sec. 271.

THE BILL IS WITHOUT EQUITY, AS NOT OFFERING OR SUBMITTING TO DO EQUITY, BY RETURNING OR OFFERING TO CREDIT THE JUDGMENT WHICH HAS BEEN COLLECTED.

The soundness of this point is not to be tested by the smallness of the judgment collected, or the alleged greatness of the original demand. Principles are not tested by amounts in particular cases. The question is, whether a plaintiff having two several judgments against separate defendants upon a joint demand, can collect one of the judgments or both of them, and then file a bill to set aside the judgments and proceed upon the original demand without a return or credit of the money collected. To allow this to be done, would violote one of the clearest and most universal principles of equity, which is embodied in the maxim: "He who seeks equity, must do equity."

1 Pomeroy's Eq. Juris., Secs. 385 and 395;
Hatchett v. Blanton, 72 Ala., 423.

The United States, when it comes into equity, submits to the rules and principles governing courts, just as a private individual does, and it can no more assume an inconsistent position, than an individual can; and it is clear that a private person cannot take under and against a will, or under and against an assignment, or claim the benefit of a judgment, and at the same time, proceed upon the original consideration. It is evident that the complainant in this case, who shows in the bill

the payment of one of the judgments, and sets up a claim that the other is due and owing to the United States, has no standing to proceed upon the consideration of the judgments and for their vacation and annulment, without a submission to do equity by returning the money collected—which has not been done in this case. It is not impossible that the amount of the judgment may exceed the recovery on the original demand.

THE BILL MAKES NO CASE FOR THE ANNULMENT OF THE JUDGMENTS.

The peace of society requires that some limit be put upon the right to reopen controversies. The rule is embodied in the maxim: "*Interest rei-publicae ut sit finum litium.*" And this maxim is illustrated alike in the rule which makes "time cover past transactions with her mantle of repose," and that which gives to judgments in adversary proceedings, unimpeached for fraud, the sanctity of absolutism. Courts are instituted for the very purpose of finally closing controversies involving rights and duties. The proceedings are what is called "adversary." Each party understands that he must bring to bear upon the issue joined every resource of argument and evidence calculated to have a bearing upon the result. He is forewarned that the judgment rendered, unless impeached for error apparent upon the face of the proceedings, forever puts at rest the matters at issue. Here the complainant selected its tribunal, and selected the attorney to represent it, and confided the management of its case to this attorney, and by compulsory process forced the defendants to come in and defend against its claims. They did so, and the records of the tribunal show upon their face regular

proceedings, terminating in judgments for specific sums. The factum and effect of the judgments, under such circumstances, can no more be minimized or vacased by the allegation that they were the result of a *ruse de guerre*, than can Spionkop and Gettysburg upon like suggestions. These civil battles are as conclusive, with one exception, as the imperious mandate of martial force. The exception in favor of the civil proceeding is, that if it is averred and shown that the judgment is the result of fraud of one party by which the other, without fault on his part, was prevented from having a fair trial and decision of his case, the judgment will be set aside and a new trial awarded. This rule, as to the finality of judgments, is one of public policy and seems to be absolute and universal. The matter is most fully considered in the case of Pico v. Cohn, 91 Cal., 129, and the notes of Mr. Freeman in the report of the case, in 25 American State Reports, 159; also, in the case of the United States v. Throckmorton, 98 U. S. 61, and in Marine Ins. Co. v. Hodgson, 7 Cranch, 332, and in cases cited in Marshall v. Holmes, 141 U. S., page 596.

Unless fraud of the character mentioned is alleged, the judgment-roll imports absolute verity. That is to say, the recitals and statements of the record cannot be impeached except by the record itself. This excludes all parol evidence of the falsity of record recitals, and in this case excludes every averment of the bill impeaching the judgments, if the averments were in other respects sufficient.

In Mobley v. Nave, 67 Mo., 549, it is said:

"If it could be shown by parol that a court was in session, when the records of such court show that it stood adjourned on that day, we see no reason why it cannot also be shown by parol that a court was not in

session, when its records show that it was in session. The confusion and injury which might ensue upon the admission of parol testimony for such purpose in a collateral proceeding is manifest. Proceedings in a court of record are only to be proved by the record." Citing a number of authorities.

See also 1 Freeman on Judg., 125.

As the allegation of fraud is the only means by which we may look behind the judgment-roll, the first question is, whether or not there are such allegations in the bill. This court has decided that the only fraud which will authorize the vacation of a judgment is one which is extrinsic or collateral to the question examined and determined in the original action. And that a fraud is not extrinsic or collateral within the meaning of the rule unless it is one the effect of which prevents a party from having a fair trial without his fault.

U. S. v. Throckmorton, 98 U. S., *supra;*
Pico v. Cohn, 91 Cal., *supra;*
Marine Ins. Co. v. Hodgson, *supra.*

We have quoted above at length the allegations of the bill relating to the rendition of the judgments. And it will be seen by a reference to them, that there is no insinuation that that the District attorney was corrupted by either of the defendants, or that the court trying the case was corrupted by either of the defendants. Every resource of the Government was at the command of the District Attorney representing it in the litigation, and if he allowed the judgments to go as stated in the bill, it is evident that it was by his own fault, and his fault in the management of the matter committed to his care is the fault of the plaintiff. The acts of the defendants, by the statements of the bill, were mere verbal declara-

tions in court, which the District Attorney was warned by his hostile position not to credit, or to credit at his peril. Suppose the declarations of the defendant were material to the issue tried, and were sworn to in a plea duly filed, or were deposed to upon the stand, would the adverse party be entitled to relief because of the falsity of the statements? The authorities clearly hold the negative. How much more, then, should mere loose and immaterial verbal declarations afford no right to relief. It is evident, then, that notwithstanding all the allegations of the bill, the plaintiff might, but for its own fault, have had a fair trial at law; and beyond this it is likewise evident that the statements charged against the defendants were not fraudulent in any respect, and are not shown not to have been honestly believed by them when made; and, indeed, are not shown not to have been absolutely true, as to each of the defendants; for the bill shows a formal report to the State court of the insolvency of Henshaw's estate, and a return of no property found on executions against Beebe by the U. S. Marshal on one of the judgments sought to be collected in 1880, five years before the acts charged in the bill. And it is nowhere alleged or suggested in the bill that the defendants had any property free from superior liens at the date of the judgments.

The allegations of the bill, then, with respect to the alleged frauds, are insufficient in every respect. The plaintiff believed the representations set out at its peril, and, besides, the statements were innocent, were not calculated to mislead any one, and may have been absolutely true.

No sufficient fraud, then, is charged, and the judgment-roll thus imports absolute verity, and it reciting that the judgment was in pursuance of a verdict found

"by a jury of good and lawful men, to-wit, G. L. Werth and eleven others," all inquiry as to the truth of this recital is cut off. We are required to believe the judgment rather than any parol evidence to the contrary. This court said in the case of Jeter v. Hewitt, 22 Howard, 363–4, that the authority of *res judicata* is absolute, its words being:

"That the maintenance of public order, the repose of society, and the quiet of families, require that what has been determined by competent tribunals shall be accepted as irrefragable truth; so deep is this truth implanted in her jurisprudence, (referring to Louisiana), that commentators upon it have said, that *res judicata* renders white that which is black, and straight that which is crooked. *Facit ex curvo rectum, ex albo nigrum.* No other evidence can afford strength to the presumption it creates, and no argument can detract from its legal efficacy."

This requires us then, to accept the record as absolutely true and to exclude from consideration the allegations of the plaintiff that the recitals of the judgment as to the regularity of the trial are in fact false. The case of the plaintiff, then, as made by the bill, is without basis in form or in substance, and the judgment of the lower court so holding, it seems, should be affirmed.

REPLY TO APPELLANT'S POINTS AND AUTHORITIES.

The position of the appellant in the lower courts was, in effect, that defendants prosecuted by the United States were bound at their peril to see that the District Attorney was wise, vigilant and effective in the discharge of his duties against them, and that, if by any accident or slip on his part, or on the part of the court,

and, on the same principle, we might include the jury, a judgment is rendered for too small a sum, the records may be impeached collaterally by parol evidence, and the controversy may be opened up, on a bill such as this, *perpetually*—that is to say, after all the actors in, and the witnesses to, the particular transaction have passed away. And beyond this, it is claimed, that if the United States elects to sue one hundred people separately and severally on a joint demand, and recovers in each case and collects one judgment, the election to sue separately and the payment in full of the demand may be disregarded, and all the defendants may be united in one suit to vacate the hundred several judgments for several acts charged against the several defendants, and to collect the original demand without any offer to return the collection made.

Is this an exaggeration, or a legitimate extension and application of the position of the appellant?

We undertake to show that this is the legitimate result of what is claimed.

In the first place, if two several judgment debtors may be united, there is no reason why the number should not be extended. Two are here united, and the representations which the defendants are alleged to have made were several, each for himself, and the act of the District Attorney in taking separate judgments was several as to each defendant, and one of the judgments was paid, and there is no offer to do equity. The last part of the charge, then, is made out.

As to the first part, the bill seeks to impeach the verity of a judgment by parol evidence contradicting the judgment-roll, and does not allege more than that

the District Attorney representing the appellant was remiss in the discharge of his official duties.

It thus appears that the theory upon which appellant's contention rests is not over-stated. And as stated it is believed it can find acceptance with no court.

The theory upon which the contention rests is that the District Attorney was a mere attorney in the case, and that he had no authority to *compromise* a claim of the Government—and that the case in hand was *compromised*, and thus does not bind the Government. And the chief authority relied on is the case of Holker v. Parker, 7 Cranch, 436.

It is not denied that the powers and authority of an attorney are limited and special. But we do deny that there is any limitation upon the power of the attorney to neglect his client's case, so far as third persons are concerned. In the conduct of the cause, he is the *alter ego* of the principal, and no reason or authority can be found to the point, that strangers, and especially adverse parties, have any duty to perform in seeing that he discharges his duties in a proper way, so long as there is no corruption of the attorney and no hindrance interposed by the defendant to the proper discharge of his duty. It would be exacting too much of human nature to impose upon an adverse party any duty respecting the conduct of opposing attornies beyond that of legal fairness.

As to the case of Holker v. Parker, 7 Cranch, 436, it may be reconciled with the general doctrine as to giving relief against judgments expressed by the same judge in the previous case of Marine Ins. Co. v. Hodgson, in the same volume, page 332, and confirmed in numerous

cases since then, including United States v. Throckmorton, 98 U. S., 61, and indeed down to Graver v. Faurot, 162 U. S. 535, which clearly approves the case of Throckmorton.

It will be observed that no question is made in the case of Holker about the verity of the judgment, but only the conclusiveness of the award on which the judgment is rendered.

The obvious reason of this is, that judgments on awards are in fact on their *face* consent judgments; and "consent judgments are, in effect, merely contracts of parties, acknowledged in open court, and ordered to be recorded." The court in such cases, as is said in T. & P. R. Co. v. S. P. Co., 137 U. S., 48, and L. M. Co. v. Janesville C. M., 138 U. S., 552, merely records what is agreed in advance, and thus the matter is not *res judicata*.

And in such cases, when the parties act in a representative capacity, such judgments do not bind the *cestuis que trustent*, unless the trustees had authority to act.

Union Bank of Richmond v. Commissioners of Oxford, 119 N. C., 214;
Texas & Pac. R. Co. v. Southern Pac. Co., 137 U. S., 48;
Gay v. Parpart, 106 U. S., 679–699;
Lawrence M. Co. v. Janesville Cotton Mill, 138 U. S., 552;
Wadhaws v. Gay, 73 Ill., p. 433-4-5;
Norton v. Brownsville, 129 U. S., p. 505.

The record in the case of Holker did not disclose a judgment in the ordinary form, and the impeachment

was thus merely of the award. The holding of the court was, that an attorney cannot compromise without authority. It will be observed, too, that the court lays much stress upon the accident of the defendant's detention from attendance by arrest in a distant state. Here, however, the judgments are regular on their face, and appear to be in adversary proceedings, and are thus conclusive, unless it was alleged that the District Attorney was corrupted and was not merely negligent.

The complainant thus does not bring itself within the general rule that he must be without fault. In the case of Throckmorton, the District Attorney was as negligent as in this case, but he was not corrupted, nor was he here, and the judgments are as conclusive in the one case as in the other. The judgment entry nullifies all averment contradicting its statements in the absence of fraud, as defined in the case of Throckmorton; and there being no such charge here made, the judgment recital precludes any consideration of the question of the compromise of the claims by the District Attorney.

Independent, then, of all questions relating to the frame of the bill and other preliminary matters, it seems that the bill is insufficient on the merits, and that the lower court correctly so determined.

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